City of Tampa
Jane Castor, Mayor

Office of the City Attorney
Gina K. Grimes, City Attorney
315 E. Kennedy Blvd., 5th Floor
Tampa, Florida 33602

Office (813) 274-8996
Fax: (813) 274-8809

MEMORANDUM

DATE: **August 13, 2019**

TO: **Tampa Bay Water Board of Directors**

FROM: **Janice M. McLean, Senior Assistant City Attorney**

Subject: **Response to Legal Opinion Issued August 5, 2019 by George H. Nickerson, Esquire**

Tampa Bay Water Board of Directors requested that George Nickerson and Thomas Giblin consider questions posed regarding the proposed Tampa Augmentation Agreement and Memorandum of Understanding (TAP Agreement) as well as other questions identified regarding the Amended and Restated Inter-Local Agreement of 1998 (INTERLOCAL) (see Buenaventura memo dated May 29, 2019 attached). The conclusion that Mr. Nickerson reached did not fully address the exception to the Exclusivity Clause that was afforded to Tampa in the INTERLOCAL. Mr. Nickerson's opinion contradicts the Legal Opinion issued March 14, 2019 by the Tampa Bay Water General Counsels Barrie Buenaventura and Donald Conn, attached hereto for ready reference. It further contradicts the legal opinion of Mr. Nickerson's law partner Thomas Giblin who stated that the TAP Agreement would not affect the bond covenants of Tampa Bay Water (see letter dated October 9, 2018 attached). The following seeks to better explain and clarify Tampa's ability to use its reclaimed water in support of its authorized use of the Hillsborough River and the Tampa Bypass Canal.

EXCLUSIVITY

With the establishment of Tampa Bay Water from its predecessor, the West Coast Regional Water Supply Authority, the INTERLOCAL as developed and signed by all of its members, specifies that the Authority shall be the sole and exclusive supplier of water to the Member Governments. This tenet of the INTERLOCAL was and remains a key element in recognition of why the Authority was created. Therefore, there are very few exceptions and those are listed in Section 3.02(I)(1)-(8). However, Tampa's exception to the Exclusivity Clause is within Section 3.08 and 3.09 because it is based on Tampa's use of surface water as its primary source of water. In fact, the entire section addresses Tampa's primacy in use of the Hillsborough River and the Tampa Bypass Canal in conjunction with the Authority. Tampa's proposed use of its reclaimed water, as envisioned in Tampa's version of TAP, can be implemented in order to support its authorized 82

MGD withdrawal without the need to amend the INTERLOCAL. All elements in support of the project, known as the Tampa Augmentation Project or TAP, currently exist in the INTERLOCAL.

TAMPA'S AUTHORIZED USE

Section 3.08(A)(1) identifies the sources of water that Tampa utilized at the time of the INTERLOCAL. It included 82 MGD annual average (AA) from the Hillsborough River, with five (5) MGD AA from Sulphur Springs and 20 MGD AA from the Tampa Bypass Canal as augmentation quantities to support the 82 MGD. Tampa had also constructed and was using its Aquifer Storage and Recovery wellfield (ASR) for storage of water withdrawn from the River in support of the 82 MGD.

The subsection goes on to identify that Tampa's use of those sources were and remain primary. It also identifies that the Authority could apply for withdrawal from the River at high flow periods not to interfere with Tampa's use. Further, the INTERLOCAL states that after the Authority had satisfied its need for water from the River during high flow periods, Tampa is authorized to seek an increase in its rate of withdrawal up to 142 MGD peak month and maximum day. This language supports the premise that Tampa is allowed to seek additional water to, at a minimum, support its authorized 82 MGD.

In Subsection 3.08(B), the members agree that the Authority will not plan or develop water sufficient to meet Tampa's needs given the authorized 82 MGD. The section does address how the Authority could address Tampa's need for water upon the occurrence of environmental or catastrophic circumstances. The actions are enumerated, but in no circumstance could Tampa's full needs be met given the constraints of the INTERLOCAL. Even in times of drought, the INTERLOCAL states that Tampa Bay Water will use its "best efforts" but Tampa will only receive water that is available after the needs of all the other members are satisfied. Therefore, it is Tampa's obligation to ensure a sustainable supply of water for its customers.

Again, subsection 3.08(c) reiterates the fact that Tampa may seek an increase of rate of withdrawal AFTER the Authority has received its permits for withdrawals and only if Tampa's increase would not interfere with the Authority's withdrawals. The section continues that after those conditions are met, the INTERLOCAL contemplates Tampa could seek an increase of withdrawals for "environmental regulatory needs." Such environmental regulatory needs would be meeting minimum flow requirements for the Lower Hillsborough River that were established by rule including a recovery strategy in 2007. The rule limits Tampa's use of the River during low flow times and causes Tampa to rely on the augmentation quantities identified in the INTERLOCAL.

Tampa owned and operated its Aquifer Storage and Recovery wellfields in support of its authorized 82 MGD at the time of the creation of the INTERLOCAL and it still does. In fact, in section 3.08(H) the INTERLOCAL authorizes Tampa's continued use of its ASR and does not limit it in any manner. It further provides Tampa the option of whether to continue to incorporate its ASR when the Authority could provide additional surface water to the region and Tampa. The

definition of Aquifer Storage and Recovery in Section 1.01(A) states that it is "the process of injecting, storing and recovering water from aquifer systems." "Water" as defined in Section 1.01(PPP) means Quality Water and Any other water to be used by a Member Government in its public supply system."

It has been suggested that Tampa cannot implement TAP because it would be operating "Water Supply Facilities" as defined in the INTERLOCAL However; it is a basic tenet of contract construction and interpretation that the entire document must be read in pari materia. Given that there is a definition for "Aquifer Storage and Recovery" and the authority for Tampa to use its facilities defined as such using Water, as defined, Tampa would arguably be doing nothing more than utilizing its ASR wellfields with reclaimed water as the source of supply in support of withdrawals from the River.

RECLAIMED WATER

Reclaimed Water and its use is addressed in Section 3.09. It is succinct and with only one exception states that the Members retain the exclusive right to develop, own and/or operate ALL facilities for reclaimed water. The only exception was a potential project at the time that would have incorporated some of Tampa's reclaimed water to be used to develop additional supply. Tampa Bay Water did not choose that project as part of its regional plan and deadline for Tampa Bay Water to use Tampa's reclaimed water as part of the regional water supply source expired on December 31, 2012. As a result, all of Tampa's reclaimed water remains Tampa's to develop in its best interests.

TAP is the utilization of Tampa's reclaimed water to support its authorized 82 MGD. In its most simple explanation, Tampa's reclaimed water will be piped from its Advanced Wastewater Treatment plant at the Port of Tampa to Aquifer Storage and Recovery wells close to Tampa's Water treatment plant at its reservoir on the Hillsborough River. The reclaimed water will be injected into a recharge well and then recovered from adjacent recovery wells. The water can either be stored for use later or recovered immediately from the recovery wells. The water will be discharged into the reservoir where it will remain unless withdrawn.

CONCLUSION

It is Tampa's position that the conclusion reached by Mr. Nickerson is too narrow as applied, especially to Tampa. His statement ". . .it seems clear that the parties intended to limit the use of Reclaimed Water by the Member Governments to irrigation and other non-potable purposes. ." misconstrues the clear reading of the INTERLOCAL and certainly the reality of the use of advanced treated reclaimed water as part of water supply sources in development today in Florida and nationally.

Tampa believes that the INTERLOCAL provides for Tampa's authorized use of 82 MGD from the Hillsborough River as well as augmentation from additional sources, including its reclaimed water. Tampa lost the use of 5 MGD from Sulphur Springs with the implementation of the recovery

strategy for the minimum flow for the Lower Hillsborough River. It will also continue to shoulder the obligation of meeting the minimum flow, so water available from TAP will assist in meeting that obligation. Under the INTERLOCAL Tampa could request additional water to meet environmental purposes and is authorized to seek additional quantities of water for such purposes pursuant to Section 3.08(C). The reclaimed water used to develop water from TAP does not interfere with any source that the Authority could even envision using since reclaimed water and its use and development remain with the Members, not within the purview of Tampa Bay Water as Mr. Nickerson concluded.

Mr. Nickerson referenced a 2017 proposal by TAMPA prepared for consideration by the members of the ad hoc Reclaimed Committee formed by the Tampa Bay Water Board to amend the INTERLOCAL to initiate discussion. This proposal was intended to be applicable to ALL of the members to be able to develop the use of their reclaimed water. This proposal was not an indication of what Tampa believed its position lacked to develop its reclaimed water but rather for all members to be able to develop their reclaimed water for the highest and best purposes for the benefit of the region. The proposal was soundly rebuffed so an agreement was developed between Tampa and Tampa Bay Water and facilitated by the Southwest Florida Water Management District for consideration by the Tampa Bay Water Board. Just as Mr. Nickerson references previous versions of the INTERLOCAL, it is only the resulting current INTERLOCAL on which the members can rely and to which he agreed during the meeting of June 17, 2019.

Donald D. Conn
Cell: 727.641.9963
don@cbllalaw.com

Barrie S. Buenaventura
Board Certified in City, County and Local Government Law
Cell: 813.471.7427
barrie@cbllalaw.com

Conn & Buenaventura, P.A.
ATTORNEYS AT LAW

MEMORANDUM

TO: Tampa Bay Water
Board of Directors

FROM: Barrie S. Buenaventura BSB
Tampa Bay Water General Counsel

DATE: May 28, 2019

RE: Request for Analysis of Legal Issues

At the April meeting of the Board of Directors, the Board requested analysis of several legal issues regarding the TAP Agreement and MOU and the respective rights of Tampa Bay Water and Member Governments to use reclaimed water. In undertaking the analysis of these legal issues, we indicated we would work with Member Government attorneys and we were also asked to work with attorneys who were involved with drafting the Interlocal Agreement in 1997 and 1998.

We reported to the Executive Committee in May that we recently had an initial meeting with George Nickerson, Tom Giblin and Peter Dunbar (the "Governance attorneys"), who were all involved in drafting the Interlocal Agreement and Master Water Supply Contract, to discuss the Board's request. This resulted in developing the attached list of issues, modified as a result of the Executive Committee meeting, that we believe are pertinent to the Board's discussion of the requests for legal analysis as well as issues that arose during the Board's consideration of the TAP Agreement and MOU. We identified several dates when the Governance attorneys are available and surveyed the Member Government attorneys for their availability. As a result, a meeting has been scheduled the afternoon of June 17, 2019, the date of the next Board meeting, to begin these discussions. In addition, as requested by the Executive Committee, we have arranged for George Nickerson to attend the June Board meeting to hear directly from the Board on these and other issues.

Please let me know if you or your Member Government attorney have suggested revisions to the attached list.

Attachment
cc: Matt Jordan, General Manager
Member Government Attorneys

INTERLOCAL AGREEMENT ISSUES FOR CONSIDERATION

(1) Is the TAP MOU consistent with and in compliance with the Interlocal Agreement?

(2) Does Tampa Bay Water have the legal right to assign its rights/interests in Water Supply Facilities to a Member Government?

(3) Does the reference to "Reclaimed Water" at the end of sec. 3.08(A) mean that Tampa can exceed the quantity limits in secs 3.08(A)(1) and (A)(4) with additional quantities from the use of Reclaimed Water?

(4) Can Tampa Bay Water and Tampa be the sole signatories to the TAP MOU, or do all Member Governments have to approve it?

(5) Does the TAP MOU give up any of Tampa Bay Water's water production rights?

(6) Does the Interlocal Agreement limit TAP to 1 mgd annual average?

(7) Does the TAP MOU set a precedent that would allow other Member Governments to develop and implement reclaimed water projects for potable supply like Tampa?

(8) What legal rights does the Tampa Bay Water Board have in the Interlocal Agreement regarding Reclaimed Water, in light of the exclusive right that Member Governments have in sec. 3.09 to develop, own and/or operate all facilities for Reclaimed Water?

Donald D. Conn
Cell: 727.641.9963
don@cbflalaw.com

Barrie S. Buenaventura
Board Certified in City, County and Local Government Law
Cell: 813.471.7427
barrie@cbflalaw.com

Conn & Buenaventura P.A.
ATTORNEYS AT LAW

MEMORANDUM

TO: Tampa Bay Water
Board of Directors

FROM: Barrie S. Buenaventura BSB
Donald D. Conn DDC
Tampa Bay Water General Counsel

DATE: March 14, 2019

RE: Agreement and Memorandum of Understanding with the City of Tampa Regarding the Tampa Augmentation Project

---

With an updated draft of the Agreement and Memorandum of Understanding with the City of Tampa Regarding the Tampa Augmentation Project ("Agreement and MOU") now before the Executive Committee, the following is our legal analysis concerning questions that have been raised in discussions with staff and Member Government attorneys:

1. Is the Agreement and MOU consistent with the Interlocal Agreement?

2. Does the Interlocal Agreement limit the Tampa Augmentation Project ("TAP") to 1 mgd annual average?

3. Does the Agreement and MOU set a precedent that would allow other Member Governments to develop and implement a project similar to TAP?

For the reasons set forth below, it is our opinion that the Agreement and MOU is essential for implementation of TAP in a manner that is consistent with the Interlocal Agreement, does not limit TAP to 1 mgd annual average, and does not set a precedent for other Member Governments to develop and implement a project similar to TAP.

1. Is the Agreement and MOU consistent with the Interlocal Agreement?

A cornerstone of the Interlocal Agreement is Tampa Bay Water's role as the exclusive provider of wholesale water to the six Member Governments. See, Interlocal Agreement Section 3.02. There are limited exceptions to exclusivity, and they are enumerated in the Interlocal Agreement in Sections 3.02(I) and 3.06 through 3.10.

Tampa has a unique exception to exclusivity described in Section 3.08 that is primarily premised on its historical use of surface water as a source of potable supply. Section 3.08(A)(1) reserves to Tampa its permitted withdrawals from the Hillsborough River of 82 mgd annual average, 92 mgd peak month, and 104 mgd maximum day and Section 3.08(A)(4) authorizes Tampa to apply to increase its withdrawals from the Hillsborough River under certain conditions up to 142 mgd peak month and 142 mgd maximum day. The following language is found at the end of Section 3.08(A) and applies to this section in its entirety, including its four numbered subsections: "It is understood and agreed that Tampa's exception to the exclusivity requirements of Section 3.02 hereof is limited to the quantities described in Sections 3.08(A)(1) and 3.08(A)(4) and the use of Reclaimed Water, as set forth in Section 3.09 hereof."

Section 3.09 states that if TWWRP (a project premised on the use of Reclaimed Water for drinking water purposes) is not developed by Tampa Bay Water by specific dates in the Interlocal Agreement, Tampa Bay Water "shall have no right, title or interest of any kind whatsoever in any of the tertiary treated wastewater produced by Tampa's Howard F. Curren Wastewater Treatment Plant and Tampa will retain the rights to develop, own and/or operate facilities for Reclaimed Water." TWWRP was not developed by Tampa Bay Water, precluding any right, title or interest Tampa Bay Water may have had in the wastewater produced by Tampa's Howard F. Curren Wastewater Treatment Plant.

Section 1.01(YY) defines Reclaimed Water to mean "Water that has received at least secondary treatment and basic disinfection and is reused after discharge from a domestic wastewater treatment facility." Section 1.01 (PPP) defines Water to mean "Quality Water and any other water to be used by a Member Government in its public water supply system."

Read together, these sections of the Interlocal Agreement grant Tampa an exception to exclusivity which allows Tampa to use Reclaimed Water for potable supply through its surface water system, in addition to the quantities identified in Sections 3.08(A)(1) and (4). That is, Tampa is authorized to withdraw up to 82 mgd annual average of water sourced from the Hillsborough River together with any additional quantity derived from Reclaimed Water that it receives regulatory approval to withdraw. In addition, Section 3.08(C) authorizes Tampa to seek an increase in the annual average withdrawal from the Hillsborough River Reservoir to satisfy environmental regulatory needs after Tampa Bay Water's permitted withdrawals for regional use have been met.

Nevertheless, Tampa cannot move forward with TAP as currently designed without the Agreement and MOU because Section 3.02 states that "Member Governments shall not own or operate Water Supply Facilities." The recovery wells, an essential component of TAP, are Water Supply Facilities. Section 1.01 (QQQ) defines Water Supply Facilities to mean "Water production, treatment and/or transmission facilities and related real property" but excludes

facilities for local distribution. Pursuant to Section 3.02, Member Governments cannot own or operate Water Supply Facilities except those specifically authorized in the Interlocal Agreement. It is for this reason that the Agreement and MOU assigns Tampa Bay Water's interests in the TAP recovery wells to Tampa for agreed upon consideration. This assignment of rights in a Water Supply Facility is essential for TAP to be implemented consistent with the Interlocal Agreement.

Tampa Bay Water's authority to assign its interest in the recovery wells to Tampa is based on its general power to acquire and dispose of real property, or any estate therein, as provided for in Section 2.02(A)(4). Further, it is the action to dispose of a Water Supply Facility that requires an affirmative vote of at least six Board members, as required by Section 2.05(C)(4), rather than the usual five affirmative votes, as required by Section 2.05(B).

Tampa is authorized to withdraw 82 mgd average annual from the Hillsborough River. Any increase in annual average, other than to satisfy environmental regulatory needs, must be derived from Reclaimed Water, subject to regulatory approval. If Tampa desires to proceed with TAP for potable supply in addition to the 82 mgd annual average it is authorized to withdraw from the Hillsborough River, it must do so through the Agreement and MOU. Based on the above analysis, it is our opinion that the Agreement and MOU is consistent with the Interlocal Agreement.

2. Does the Interlocal Agreement limit the TAP recovery wells to 1 mgd annual average per well?

Section 3.06(A) provides an exception to exclusivity that allows Member Governments to acquire or construct a Water Supply Facility with a total capacity of no more than 1 mgd annual average for new developments within the jurisdiction of a Member Government that cannot be served by Tampa Bay Water on an economically feasible basis because of the distance between the development and the Member Government's closest transmission facility. In our judgment, the 1 mgd cap in this section does not apply to the TAP recovery wells because Section 3.06(A) is focused on isolated water supply facilities. The TAP recovery wells are not intended to serve an isolated development and the more specific exception to exclusivity which applies only to Tampa in Section 3.08 prevails over the more general exception in Section 3.06(A) which applies to all Member Governments. For this reason, the 1 mgd annual average limitation of Section 3.06(A) does not apply to TAP.

3. Does the Agreement and MOU set a precedent that would allow other Member Governments to develop and implement a project similar to TAP?

There have been questions about the precedent the Agreement and MOU may set for future Board action. First and foremost, the Agreement and MOU sets the precedent that Tampa Bay Water will look to the Interlocal Agreement to evaluate and assess proposals to and requests of Tampa Bay Water. With no specific proposal before the Board from another Member Government to use

their Reclaimed Water for potable supply independent of Tampa Bay Water, it is premature to definitively state whether it would be permissible. Each proposal must be evaluated on its individual facts and circumstances. However, Section 3.08 applies only to Tampa and no other Member Government may rely on it as a basis for an exception to exclusivity. Section 3.09 provides that all Member Governments "retain the exclusive right to develop, own, and/or operate all facilities for Reclaimed Water." While this section clearly indicates that Tampa Bay Water does not have an ownership interest in Member Governments' Reclaimed Water, it does not expressly state that Member Governments retain the right to construct Water Supply Facilities in order to use their Reclaimed Water for potable supply. This Agreement and MOU does not set a precedent on which other Member Governments can rely to develop projects similar to TAP because the exception to exclusivity and legal basis of the Agreement and MOU found in Section 3.08 does not apply to other Member Governments.

cc: Matt Jordan, General Manager
Chuck Carden, Chief Operating Officer
Ken Herd, Chief Science and Technical Officer
Christina Sackett, Chief Financial Officer
Michelle Stom, Chief Communications Officer
Peter M. Dunbar, Special Counsel

TAMPA
2502 Rocky Point Drive
Suite 1060
Tampa, Florida 33607
(813) 281-2222 Tel
(813) 281-0129 Fax

Nabors Giblin & Nickerson P.A.

TALLAHASSEE
1500 Mahan Drive
Suite 200
Tallahassee, Florida 32308
(850) 224-4070 Tel
(850) 224-4073 Fax

FORT LAUDERDALE
110 East Broward Boulevard
Suite 1700
Fort Lauderdale, Florida 33301
(954) 315-3852 Tel

October 9, 2018

Tampa Bay Water, A Regional
Water Supply Authority
Clearwater, Florida

Board of Directors:

In our role as Bond Counsel to Tampa Bay Water, A Regional Water Supply Authority (the "Authority"), we have been asked to review a draft of the Agreement and Memorandum of Understanding, dated as of October 3, 2018 (the "Agreement"), between the City of Tampa, Florida and the Authority to ascertain whether the terms of the Agreement violate provisions of the Authority's Resolution No. 98-07TBW, adopted by its Board of Directors on August 31, 1998, as amended and supplemented (the "Bond Resolution").

We have reviewed the Agreement and based upon the findings provided in the Agreement, as well as the terms thereof, we are of the opinion that the Agreement does not violate any provision of the Bond Resolution.

In rendering this opinion we have assumed that the findings provided in the Agreement are correct and the parties thereto will comply with the terms of the Agreement.

Very truly yours,

L. Thomas Giblin